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In The

Supreme Court of the United States

October Term, 1976

No. 77-72

FRANK R. WEST,

Petitioner,

vs.

STATE OF IOWA,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Iowa

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Iowa Supreme Court (App. A, Petition) is reported at 252 N. W. 2d 457 (Iowa 1977).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether a holding by the Iowa Supreme Court that the actions of Petitioner Frank R. West as set forth in his indictment could violate § 713.1, Code of Iowa, 1975, is an unforeseeable expansion of that statute prohibited by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Iowa false pretenses statute, § 713.1, Code of Iowa, 1975, the Iowa conspiracy statute, § 719.1, Code of Iowa, 1975, and the Fourteenth Amendment to the United States Constitution are set forth as Appendix D of the Petition.

STATEMENT OF THE CASE

Petitioner was indicted with Robert E. Lee on thirty charges of conspiracy to violate § 713.1, Code of Iowa, 1975, in violation of § 719.1, Code of Iowa, 1975, and of violating § 713.1, Code of Iowa, 1975. The factual basis for the indictments is set out in the opinion of the Iowa Supreme Court (App. A, Petition).

Prior to the trial date, the trial court set aside the indictments on the ground that the minutes of testimony

attached to the indictments along with the bill of particulars that had been filed did not show any false statement alleged to have been made was of a past or existing fact as required under § 713.1, Code of Iowa, 1975, but instead were statements of a promise to pay in the future the false making of which did not violate § 713.1, Code of Iowa, 1975 (App. C, Petition).

On appeal the Iowa Supreme Court reversed the trial court, holding that a promise to perform an act in the future made with no intent to perform constitutes a misrepresentation within the meaning of § 713.1, Code of Iowa, 1975, and ordered the case remanded for trial (App. A, Petition).

From that judgment and the denial of their Petition for rehearing (App. B, Petition) Petitioner petitions this Court for a Writ of Certiorari to the Iowa Supreme Court.

ARGUMENT

The Iowa Supreme Court did not expand the scope of § 713.1, Code of Iowa, 1975. Petitioner points out four quotes from the Iowa opinion in his statement of the case which he claims show that the acts committed by him were not considered a crime under § 713.1, Code of Iowa, 1975, at that time.

A superficial reading of these quotes alone would seem to indicate that the Iowa Supreme Court has expanded the meaning of § 713.1 to make previously legal

conduct now illegal. This is not the case however, as a careful reading of the entire opinion reveals.

Petitioner relies heavily on *Bouie v. City of Columbia,* 378 U. S. 347, 84 S. Ct. 1697, 12 L. Ed. 894 (1964), for support of this proposition.

The fact situation in *Bouie* is different from the case at hand, that statute being very narrow in its scope and very precisely worded. This Court held in *Bouie*:

> "There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language."

The holding in *Bouie* was predicated on this narrow and precise statute as this Court points out in *Marks v. United States,* — U. S. —, 51 L. Ed. 2d 260, 975 S. Ct. — (1977), when it stated:

> "The statutory language there was 'narrow and precise' 378 U. S. at 352, 84 S. Ct. at 1701, and that fact was important to our holding that the expansive construction adopted by the State Supreme Court deprived the accused of fair warning."

Section 713.1, Code of Iowa, 1975, in contrast to the statute involved in *Bouie* is broad and, as the case law cited in the Iowa Supreme Court's opinion shows, was intended to cover a variety of illegal actions.

The answer to the question presented in this case is found in *Rose v. Locke,* 423 U. S. 48, 46 L. Ed. 2d 185, 96 S. Ct. 243 (1975). A Tennessee statute forbid "crimes against nature" and the Defendant was convicted thereunder for committing the act of cunnilingus. The Defendant argued first, that the Tennessee Supreme Court had never before passed upon whether the commission of that particular act was a violation of the statute and thus, had no fair warning and second, the statute itself was unconstitutionally vague. As Petitioner points out in his Petition at page 6, this Court held that with respect to the vagueness argument "the Due Process Clause requires that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden" 423 U. S. at 50, 46 L. Ed. 2d at 188.

Respondent does not understand Petitioner to be challenging § 713.1, Code of Iowa, 1975, on the second ground urged in *Rose* that it is unconstitutionally vague and thus violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution by failing to give a person sufficient warning of what conduct is expected of him.

It is the reasoning on the first ground set out in *Rose* that is important to this case.

The Sixth Circuit Court of Appeals sustained the Defendant's challenge in *Rose* in part because it was unable to find any previous opinions by the Tennessee Supreme Court applying the statute to the act of cunnilingus and thus concluded that the statute failed to give fair warning.

This Court reversed after looking at the statutory authority in Tennessee and concluding that:

> ". . . The Tennessee Supreme Court had given sufficiently clear notice that § 39-707 would receive the broader of two plausible interpretations, and would be applied to acts such as those committed here when

such a case arose." 423 U. S. at 52, 46 L. Ed. 2d at 190.

In the case at hand the Iowa Supreme Court cites numerous Iowa cases in support of its decision where future promises and actions coupled with a present inability or intention not to perform were held to be violations of § 713.1, Code of Iowa. Indeed, the Court cites *State v. Huckins,* 212 Iowa 283, 234 N. W. 554, 559 (1931), where it said:

> "One's intention or knowledge is a fact as to which he may make a false pretense and thereby (the other elements being present) perpetrate the crime of cheating by false pretenses."

as support for the proposition that its holding is not an enlargement of the statute.

In further support of its proposition the Court cited *State v. Foxton,* 116 Iowa 81, 147 N. W. 347 (1914), wherein:

> "This court found that the presentation of a personal check implied that Defendant had the ability to pay, sustaining a false pretenses charge."

The Court went on to state in its opinion in this case:

> "We are unable to perceive difference between a finding that the false pretenses may be premised on a false promise and a finding that Defendant misrepresented an ability to pay. When a Defendant, knowing he is insolvent, promises to pay, he falsely represents his intention to pay."

The Court further stated:

> "The Iowa cases addressing this last issue are all marked by two characteristics which minimize their value as legal precedent, namely, (1) that the cases

> failed to base the results on the issue discussed here, and (2) that the cases, all of early vintage, fail to recognize the tenor of present day commercial enterprise. None of the cases hold a charge or conviction of false pretenses invalid because of a failure to allege or prove a misrepresentation of past or existing fact, although the premise appears in the text of the opinions."

Justice McCormick in his concurring opinion obviously feels the Court's holding has always been the law in Iowa by pointing out that:

> "This case comes well within the principle that a false promise may be coupled with a false representation of fact to constitute a false pretense. (Citations)."

This Court held in *Bouie v. Columbia, supra,* at 12 L. Ed. 930, 378 U. S. 354, that:

> "If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the indefensible by reference to the law which had been expressed prior to the conduct in issue' it must not be given retroactive effect."

It is clear that the Iowa Supreme Court did not expand § 713.1, Code of Iowa, 1975, to include a new act not previously thought to be criminal under a vague statute, as was raised in *Rose v. Locke, supra,* nor did it take a narrow and precise statute and expand it to conduct clearly outside its scope as in *Bouie v. Columbia, supra;* instead it merely held specifically that a promise to perform an act in the future made with no intent to perform is a violation of § 713.1, Code of Iowa, a position which was entirely consistent with its previous holdings as set out in its opinion which holdings would give Petitioner clear notice that his conduct would be held to be illegal under § 713.1, Code of Iowa.

CONCLUSION

For the foregoing reason it is respectfully submitted that this Petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John R. Perkins, Assistant Attorney General for the State of Iowa, hereby certify that on the 25th day of July, 1977, I mailed three (3) copies of Brief for Respondent in Opposition, correct 1st class postage prepaid to:

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I further certify that all parties required to be served have been served.

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